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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL HEMINGWAY, Defendant and Appellant.	B160679 (Los Angeles County Super. Ct. No. BA220175)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert P. O'Neill, Judge. Affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephen A. McEwen and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Hemingway appeals his conviction and sentence for criminal threats. Hemingway contends the trial court erred in: (1) failing to permit the defense to impeach the prosecution's primary witness, Mr. Hossain, with evidence of a prior misdemeanor grand theft conviction; (2) refusing to grant a continuance for substitution of counsel after the information was amended to make this a "Three Strikes" case; and (3) instructing with CALJIC No. 17.41.1 because the instruction improperly "chilled" jury deliberation and violated Hemingway's constitutional rights. As set forth more fully below, Hemingway has not demonstrated the court committed prejudicial errors in refusing to admit evidence, failing to grant a continuance, or in instructing the jury. With respect to his sentence, Hemingway contends his sentence of 35 years to life is cruel and unusual punishment. Given his current crime, background and criminal history, the court properly refused to deem Hemingway outside the spirit of the Three Strikes scheme. We also conclude Hemingway's sentence is not cruel and unusual. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 17, 2001, Hemingway and Thomas Bergland rented room 210 at the Best Value Inn and Suites in Los Angeles for seven days. On July 21st, at approximately 7:20 p.m., Rashedul Hossain, the assistant manager at the hotel, sat in his office. The office has a window that faces out into the reception area. Hemingway approached the reception window holding a plumber's wrench. He waived the wrench around and aggressively stated he wanted to immediately checkout and wanted a refund for the room. Hossain approached the reception window and told Hemingway that he could not give him his money back because the hotel's policy was not to give cash refunds. Hossain further stated that if Hemingway checked out that he could return the next day and in the meantime Hossain would see if he could obtain a refund for Hemingway. Hemingway did not respond and returned to his room.

Hossain, believing Hemingway might return, placed a small crescent wrench on the floor by his feet and moved the phone closer to him so he could call for help if he

needed it. Hemingway returned about five minutes later and walked into Hossain's office. Hemingway was very angry. He held the wrench and leaned towards Hossain. According to Hossain, Hemingway said "I'm asking you for the last time. I'm telling you for the last time. Give me my money." Hossain again explained he could not give him a cash refund. Hemingway, while tossing the wrench stated, "I'm going to get my friends, and when I come, I will kill you." Hemingway also told Hossain to forget about tomorrow because "[f]rom tomorrow you cannot do any business because I'm going to place fire in the building." Hossain was very frightened because he thought Hemingway was going to hit him with the wrench. Hemingway then went back up to his room.

After Hemingway left, Hossain went upstairs to see another guest. When Hossain returned to his office he wrote in the hotel log book Hemingway's name and room, and noted Hemingway threatened to kill him and "threatened me that he's going to place fire in the building." Approximately eight minutes later, Hemingway returned downstairs with a large white laundry bag and a bicycle. He was moving quickly as though someone was chasing him and left the premises on his bike.

Approximately two minutes later, Hossain heard an individual from the street screaming, "Fire. Smoke." Hossain ran outside and saw smoke coming out of the window of Hemingway's room. Hossain entered the room and saw it was full of smoke and the carpet was wet. He relocked the door and went downstairs to call 9-1-1. At approximately 9:45 that night, Investigator James Thornton, an arson investigator for the Los Angeles Fire Department, arrived on the scene. Investigator Thornton examined the room to determine the cause of the fire and then spoke with Hossain.

Two police officers arrived at the hotel around 1:45 a.m. that next morning. They found Hemingway sitting in the lobby area and arrested him. Around 2:00 in the morning, Hemingway agreed to be interviewed by Investigator Thornton. Hemingway was Mirandized and waived his rights. When asked during the interview whether he had threatened Hossain, Hemingway responded he might have threatened Hossain in the heat of the moment. Upon further questioning, Hemingway admitted that he stated that he

was "going to return with friends of his and collect the money," and that he was holding a "woodworking tool in his hand while he was arguing with Mr. Hossain."

Hemingway was charged in count 1 with arson of an inhabited structure or property and in count 2 with criminal threats. The information also alleged Hemingway had suffered two prior "strike" convictions. Before the trial was to begin, both parties asserted that they were ready to proceed to trial. The court also asked if there were "any special problems to which we should alert the trial court." Both parties stated that there were none. After announcing ready for trial and the day before the trial was set to begin, Hemingway requested a substitution of counsel and a continuance. Because the new counsel indicated he could not be ready to try the case the next day, the court denied Hemingway's requests.

The trial lasted seven days, and after deliberating several hours, the jury found Hemingway guilty of criminal threats, but could not reach a verdict as to the arson count. The trial court declared a mistrial as to the arson count. Hemingway admitted the prior convictions pursuant to the Three Strikes law and was sentenced to 35 years to life.

Hemingway appeals.

DISCUSSION

I. Hemingway Has Failed To Demonstrate Prejudice From the Court's Exclusion of Evidence Hossain Had a Prior Misdemeanor Conviction.

To impeach the credibility of Hossain, Hemingway sought to question Hossain about a February 22, 2000 prior misdemeanor conviction for grand theft. Appellant also wanted, in lieu of admitting the conviction, to get a personal admission from Hossain regarding the underlying conduct of the conviction. The defense theory was that Hossain was stealing items from appellant's room, and when appellant confronted Hossain on the stolen items, Hossain had a motive to call the police and lie about appellant's conduct. Thus, Hemmingway asserted the fact of the conviction and the underlying conduct was

relevant to the defense and relevant on the issue of Hossain's credibility. The trial court, however, ruled the fact of the conviction was hearsay for which there was no exception for admissibility in the Evidence Code. As to the underlying conduct the court excluded it under Evidence Code section 352 of the evidence code, ruling the prejudicial effect of this evidence outweighed any probative value.

On appeal, Appellant first argues that he should have been permitted to impeach Hossain with the conduct underlying the conviction. Appellant relies on *People v. Wheeler* (1992) 4 Cal.4th 284, in support of his argument that the conduct itself should have been admissible to impeach Hossain. *Wheeler* addressed "Proposition 8" and specifically section 28(d), called the "Truth-in-Evidence" amendment to the Constitution. Section 28(d) states that, "relevant evidence shall not be excluded in any criminal proceeding" subject to the rules of hearsay and Evidence Code section 352. (*Wheeler*, *supra*, 4 Cal.4th at p. 291.) *Wheeler* interprets section 28(d) as requiring the admission in criminal cases of all relevant evidence. (*Id*. at p. 292.) From this, *Wheeler* concludes that, "if past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion." (*Id*. at p. 295.)

Wheeler specifically looked at the conduct involving a misdemeanor grand theft conviction and found it was an offense that involved both moral turpitude and dishonesty. (*Id*. at p. 297.) Although the court admitted the underlying conduct of the offense, *Wheeler* reaffirmed that the misdemeanor *conviction* itself is inadmissible hearsay. (*Id.* at p. 297.)

Appellant initially attempted to question Hossain regarding his misdemeanor conviction for grand theft, which necessarily involved moral turpitude and dishonesty. Crimes which involve moral turpitude and dishonesty may arguably have some logical bearing on the credibility of a witness. Notwithstanding the court's ruling, the *underlying conduct* of the grand theft is not per se inadmissible under *Wheeler*.

Appellant next argues that he should have been able to impeach Hossain with the conviction itself. The *Wheeler* Court acknowledged that its holding to preclude

admissibility of the conviction itself might change if the legislature created "a hearsay exception that would allow use of misdemeanor convictions for impeachment in criminal cases." (*Id*. at p. 300, fn. 14.) In 1996, the legislature made such an exception by enacting Evidence Code section 452.5, "which provides the type of hearsay exception contemplated in Wheeler." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) Evidence Code section 452.5, subdivision (b) provides, "An official record of conviction … is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record." Neither *Duran* nor the Code section itself differentiates between felony and misdemeanor convictions.

Duran's holding, however, that section 452.5 is the exception contemplated in *Wheeler* implies that it applies to misdemeanor convictions since that was the only type of hearsay exception contemplated in *Wheeler*. Appellant attempted to introduce a certified court document of Hossain's conviction. The trial court denied the request on hearsay grounds, stating that there "is no exception for it in the Evidence Code." However, Hossain's misdemeanor conviction for grand theft was admissible pursuant to Evidence Code section 452.5. The court erred in concluding the conviction was precluded on hearsay grounds or had no basis in the Evidence Code.

Even though the misdemeanor conviction for grand theft and the underlying conduct was admissible pursuant to *Wheeler* and Evidence Code section 452.5, the trial court nonetheless retains discretion to preclude admission of both under Evidence Code section 352. "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) A trial court's discretionary ruling under section 352 will not be disturbed on appeal absent an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal. 4th 155, 201.) "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal

trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Ayala* (2000) 23 Cal. 4th 225, 301.)

In addition, "a misdemeanor – or any other conduct not amounting to a felony – is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluations which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Wheeler*, *supra*, 4 Cal.4th at pp. 296-297.)

The trial court in this case exercised its discretion under Evidence Code section 352, to preclude evidence of the conduct and the conviction, stating that the probative value was substantially outweighed by the prejudice. Specifically the trial court focused on the fact that the prior misdemeanor conviction was dissimilar to stealing from a hotel room. Thus, the evidence (i.e., both the fact of the conviction and underlying conduct) could have been prejudicial for the reason the trial court implies, namely, it might cause jury confusion. We are not persuaded the court abused its discretion in disallowing the impeachment evidence.

In any event, even were we to find the trial court erred in excluding this evidence, we would conclude it is not reasonably probable Hemingway would have received a more favorable result absent the error. Hemingway confessed to the fire investigator that he had threatened Hossain; Hemingway threatened he "was going to return with friends of his and collect the money," all the while holding a "woodworking tool." Given Hemingway confessed to the crime of criminal threats, the offense of which he was convicted, we cannot say Hemingway would have received a more favorable verdict if the court had allowed the defense to impeach Hossain with his prior misdemeanor conviction of grand theft. Any error, therefore, was harmless.

II. The Court Did Not Err In Disallowing Appellant's Motion For a Continuance.

Appellant argues that denying his right to substitute his attorney violates his right to due process and the counsel of his choice. Appellant requested a continuance the day before the trial was to begin in order to substitute attorneys. He argued to the trial judge that his attorney was not experienced enough to handle a Three Strikes case. The trial court initially stated that appellant could substitute counsel if new counsel were ready to proceed with the trial the next day. When the new counsel stated that he would not be ready, the trial court denied the motion. Appellant maintains the court erred in rejecting his request because he was not unjustifiably dilatory in obtaining new counsel, the trial court did not face "uncertainties" because a new counsel appeared in court, the request for a continuance was only the second one requested, and that appellant's current counsel was not experienced in Three Strikes cases.

"The right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing.'" (*People v. Courts* (1985) 37 Cal.3d 784, 789.) Further, "due process of law comprises a right to appear and defend with retained counsel of one's own choice." (*People v. Blake* (1980) 105 Cal.App.3d 619, 623, accord *People v. Courts*, *supra*, 37 Cal.3d at p. 790.) However, the right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.' [Citation.]" (*People v. Courts*, *supra*, 37 Cal.3d at p. 790.)

Generally, the trial court has discretion whether to grant a continuance to allow a defendant to be represented by retained counsel. (*People v. Courts*, *supra*, 37 Cal.3d 784, 790.) "The right of a defendant to appear and defend with counsel of his choice is not absolute." (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506; *People v. Blake*, *supra*, 105 Cal.App.3d 619, 624.) "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the

time of trial." [Citation.]" (*People v. Courts*, *supra*, 39 Cal.3d at pp. 790-791.) In deciding whether the trial court's denial of a continuance was so arbitrary as to deny due process, this court "looks to the circumstances of each case, 'particularly in the reasons presented to the trial judge at the time the request [was] denied.' [Citations.]" (*Id*. at p. 791.)

The trial court ultimately denied the motion to substitute counsel, stating that appellant already had private counsel and both sides had previously announced that they were ready to start trial. Appellant has the burden to show "an abuse of judicial discretion in the denial of his request for continuance to secure new counsel." (*People v. Rhines*, *supra*, 131 Cal.App.3d at p. 506.) Appellant has not met this burden.

On November 29, 2001, appellant requested and was granted a continuance when the prosecutor amended the information to add a second strike. Appellant's counsel stated that she requested a continuance so that she can "associate with someone who is an expert in three strikes law." A second continuance was granted on December 11, 2001. On January 22, 2002, both parties stated that they were ready for trial. The trial judge asked if there were "any special problems to which we should alert the trial court?" Both parties answered in the negative. Then, the day before the trial was set to begin, appellant sought to substitute counsel. "Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary." (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) The same may be true when the request is made on the day before the trial is set to begin. Appellant had already indicated his readiness to go to trial and did not apprise the court of any concerns about his counsel's experience. Appellant had two months from the time he learned that the information had been amended to add an additional strike until he announced ready for trial to discern his counsel did not, in his view, have sufficient experience to defend him in a Three Strikes case. Nonetheless, he waited until the trial was to begin to request a substitution of counsel with Three Strikes experience. The delay in making the request was excessive.

Finally, appellant's use of his claim that his present counsel was not experienced enough to handle a Three Strikes case, is not persuasive. As demonstrated above, appellant knew two months before trial that an additional strike would be alleged, giving him sufficient time to replace counsel at that time. In addition, appellant's counsel was able to get a dismissal of one count when the jury hung on that count. The trial judge believed appellant's counsel to be very competent, as he stated, "she performed to the highest standards that I would expect of an attorney." In addition, new counsel was permitted to substitute in for the sentencing phase of the trial, where his experience was most needed.

The trial court acted within its discretion in denying appellant's motion for a continuance, given the untimeliness of his request, its lack of legally sufficient reasons and its adverse effect on the orderly administration of justice. (*People v. Lau* (1986) 177 Cal.App.3d 473, 479; *People v. Johnson* (1970) 5 Cal.App.3d 851, 858.)

III. The Court Did Not Err In Instructing The Jury With CALJIC No. 17.41.1.

Appellant contends it was error to instruct the jury with CALJIC No. 17.41.1 as it violated his rights to a fair trial by chilling the freedom of expression during jury deliberation and interfering with the jury's power to engage in jury nullification. In *People v. Engelman* (2002) 28 Cal.4th 436, although the court directed that the instruction should not be given in the future (for some of the concerns expressed by appellant), it held the instruction did not infringe upon a defendant's federal or state constitutional rights. As the instruction did not affect appellant's substantial rights, he waived any claim of error by failing to object below. (Cf. *People v. Elam* (2001) 91 Cal.App.4th 298, 310-313.)

IV. Hemingway's Sentence Does Not Constitute Cruel And Unusual Punishment.

Hemingway does not take the position the Three Strikes law constitutes cruel and unusual punishment on its face. Instead he argues the law is unconstitutional as applied to him, because it is disproportionate to his crime.

Hemingway must overcome a "considerable burden" in challenging his penalty as cruel and unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) A sentence may violate the prohibition against cruel and unusual punishment if it is so disproportionate to the crime for which it was imposed it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In assessing these claims the *Lynch* court identified three factors for the reviewing courts to consider: (1) the nature of the offense and the offender; (2) how the punishment compares with punishments for more serious crimes in the jurisdiction; and (3) how the punishment compares with the punishment for the same offense in other jurisdictions. (*Id*. at pp. 425-427.)

In arguing his sentence is cruel and unusual, Hemingway compares his penalty with the punishment prescribed for more serious offenses. Specifically, he complains that as a "Third Striker" he received a more harsh sentence than a "non-strike" offender who commits criminal threats. Hemingway's comparison to a "non-striker" is misguided and illogical. (See, e.g., *People v. Ayon* (1996) 46 Cal.App.4th 385, 400, overruled on different grounds in *People v. Deloza* (1998) 18 Cal.4th 585; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) Hemingway is being punished for both his current offense and his prior criminal behavior under a California statutory scheme which allows for more severe punishment for habitual criminals. Statutory schemes providing for increased punishment for recidivists have long withstood the challenge of cruel and unusual punishment. (See *Rummel v. Estelle* (1980) 445 U.S. 263, 268; *People v. Weaver* (1984) 161 Cal.App.3d 119, 126 & cases discussed therein.) Thus, his comparison with a non-strike criminal, even one convicted of criminal threats, is inapt.

Hemingway, while 28 years old at the time of this latest crime, has a criminal record dating back to 1991. Over the years he has suffered numerous felony and misdemeanor convictions as well as probation violations. His record includes multiple convictions for burglary and petty theft, as well as a conviction for grand theft and battery of a police officer. Moreover, his current conviction was serious and included a threat to kill an individual, while holding a weapon. In view of his current offense and his recidivism, we conclude Hemingway's sentence is not shocking or inhumane in light of the nature of the offense and offender, and accordingly does not constitute cruel and unusual punishment. (See, e.g., *People v. Dillion* (1983) 34 Cal.3d 441, 479, 482-88; [determinations of whether a punishment is cruel or unusual may be based on solely the nature of the offense and offender]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Hemingway's sentence also satisfies the second and third prongs of the *Lynch* test. Hemingway's sentence under Three Strikes is on par with other enhanced sentences for repeat offenders which have been upheld by the courts. (See, e.g., *In re Rosencrantz* (1928) 205 Cal. 534, 535-36; *People v. Cooper* (1996) 43 Cal.App.4th 815, 826-27; *People v. Weaver*, *supra*, 161 Cal.App.3d at pp. 125-26.) In addition, "California's 'Three Strikes' scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, overruled on different grounds in *People v. Dotson* (1997) 16 Cal.4th 1397.)

Likewise we see no basis for invalidating the sentence under the Eighth Amendment. (See *Harmelin v. Michigan* (1991) 501 U.S. 957 [sentence of life without possibility of parole upheld for possession of 672 grams of cocaine].)

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.